81-1514

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ALEXANDER L. STEVAS,
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1982

STATE OF ALABAMA,

PETITIONER

VS.

CHARLES BRACEWELL,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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COUNSEL FOR PETITIONER

QUESTION PRESENTED

DOES THE DECISION OF THIS HONORABLE COURT IN BECK V. ALABAMA (447 U. S. 625 [1980]) REQUIRE THE AUTOMATIC RETRIAL OF ALL CASES TRIED UNDER THE ALABAMA CAPITAL PUNISHMENT STATUTE PRIOR THERETO WITHOUT REGARD TO THE EVIDENCE?

PARTIES

In the Circuit Court of Covington County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner herein and Charles Bracewell, Respondent herein.

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OPINIONS BELOW

The opinions or order of the court of Criminal Appeals of Alabama is not as yet reported but will be reported as;

Bracewell v. State, (Cr. App. Ala., 1981) _____So. 2d _____.

The same is submitted herewith as Appendix "A". hereto.

Writ was denied by the Alabama Supreme Court without an opinion.

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued December 11, 1981, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which sahll abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law..."

STATUTORY PROVISIONS INVOLVED

Code of Alabama, 1975, Title 13, Sections 13-11-1 through 13-11-9.

STATEMENT OF THE CASE

Respondent, Charles Bracewell, was convicted under Alabama's Death Penalty Statute of the robbery-intentional killing of Rex Carnley and sentenced to death. The conviction and sentence was affirmed by the Alabama Court of Criminal Appeals in an opinion issued January 30, 1979. The Alabama Supreme Court,on petition, remanded the case to the trial court to determine whether or not a juror in the case, in spite of her attitude towards capital punishment, could have considered the evidence and instructions of the court and returned a verdict of guilty if warranted. The Alabama Supreme Court further held that the sentencing authority misapplied an aggravating circum-

stance and should reconsider its finding that the capital felony was committed for pecuniary gain. Application for Rehearing was overruled September 7, 1979. The case was remanded by the Court of Criminal Appeals on October 16, 1979. Upon the trial court's actions in this regard, the Court of Criminal Appeals affirmed again in an opinion dated January 22, 1980.

On March 6, 1981, the Alabama Supreme Court reversed and remanded on the authority of Beck v. Alabama, 447U. S. 6251, (1980). Then on April 10, 1981, the Court issued an order overruling application for rehearing, withdrawing its opinion of March 6, 1981, and reversing and remanding the case to the Court of Criminal Appeals for further consideration in light of Beck, supra. The Court of Criminal Appeals reversed and remanded the cause to the trial court on August 4, 1981. Application for Rehearing

was overruled on October 6, 1981.

On October 20, 1981, the State filed a petition for writ of certiorari in the Alabama Supreme Court. That writ was denied on December 11, 1981, without opinion. To that denial, and the issues raised herein this petition is filed.

STATEMENT OF THE FACTS

The facts concerning this crime indicate that on the evening of August 14, 1977, the deceased, Rex Carnley drove from his home near Opp. Alabama, to his own store nearby. Mr. Carnley went to the store for the express purpose of spending the night there because he had suffered numerous burglaries there in the recent months. He locked himself inside the store.

The body of Carnley was discovered the next morning, August 15, 1977, inside the store. Carnley's billfold and cash were missing. Testimony revealed that

Carnley had died as a result of multiple gunshot wounds to the head. Nine wounds were found in the body.

Charles Bracewell was arrested in November, 1977, on an unrelated charge. Having been fully advised of his constitutional rights and indicating he understood those rights he made a confession. That confession indicated that he and his wife had gone to Rex Carnleys store on the morning of August 15, 1977, with the intention of robbing him. They both were allowed in the store where Charles Bracewell shot him several times in the face. Before taking his money Charles Bracewell and his wife took turns firing shots into Carnley's body.

Numerous other statements, communications and correspondence was made by Bracewell which indicated his involvement in this crime. These included further confessions to authorities, letters to

his wife and statements to people not connected with law enforcement.

Certain evidence was retrieved as a result of Bracewell's confession. Scientific bullistic tests were run which not only substantiated Bracewell's confession but also his involvement in the crime.

> tionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verict?' 444 U.S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204
>
> "We now hold that the death penalty may not be imposed under these circumstances..." (447 U.S. 625, 627, 65 L. Ed. 2d 392,396).

Thus , Beck was carefully limited to its facts. In fact, this Honorable Court expressly declined to extend the Beck rule to non-capital cases. See Note 14, 447 U. S. 625, 638, 65 L. Ed. 2d 392, 403.

A review of how the Alabama Courts have applied the Beck rule to cases in which there is no evidence of lesser included offenses follows.

In Ritter v. State ([S. Ct. Ala., 1981] 403 So. 2d 154) the Alabama Supreme Court reversed, on authority of Beck v. Alabama,[1] supra, the conviction

of a criminal defendant who had pleaded guilty to the capital offense, frankly admitted his guilt and demanded the death penalty. In denying rehearing in Ritter, the Court wrote:

> "...We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F. 2d 221 [March 19, 1981] (1981)[2], which

---

[1] "...SHORES, JUSTICE.

" Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65L. Ed. 2d 392 (1980), and Beck v. State [MS. Dec.19, 1980], 396 So. 2d 645 (Ala. 1980).

"REVERSED AND REMANDED."

[2] Pending in this Honorable Court on writ of certiorari sub.nom. Hopper v. Evans,80-1714,Certiorari granted June 22, 1981, sub nom. Britton v. Evans 49 U. S. L. Wk. 3954.

involved Ritter's partner in this crime..." (emphasis supplied).

Ritter established a pattern for all the pre-Beck cases. Retrial was deemed required by this Honorable Court's decision and opinion in Beck. See, for example, Bracewell v. State (S. Ct. Ala., 1981) 401 So. 2d 130. [3] The orders in

---

[3] Initially the writ was denied on June 19, 1981, with a brief memorandum by Justice Maddox, which read:

"Petition for Writ of Certiorari is denied."

"By Denying the writ of certiorari in this case , we assume that the Court of Criminal Appeals after reviewing the record in this case, has determined that there wassome evidence presented which would have entitled the accused to an instruction on a lesser included offense.

"Writ denied." (unreported manuscript opinion) (Emphasis supplied.)

However, six (6) days later Justice Maddox's opinion was withdrawn on the Court's own motion, and the following was issued:

"The opinion dated June 19, 1981, is withdrawn and the following, together with Justice Maddox's special concurring opinion, is substituted in its place.

"WRIT DENIED." (Bracewell v. State [S Ct. Ala., 1981[401 So. 2d 130)

these cases result solely from the Alabama Supreme Court's understanding of Beck v. Alabama (supra). If there was ever any doubt about this, it was dispelled when this Honorable Court vacated and remanded the Ritter case for reconsideration of an alternative basis for these orders. Alabama v. Ritter 50 U.S.L. Wk. 3277 (Oct. 13, 1981) . On Dec. 11, 1981, the Alabama Supreme Court wrote:

> "The United States Supreme Court has remanded this case to this Court for further consideration in light of Reed v. State, Ala., [MS. June 12, 1981] ____So. 2d ____ (1981) extended on rehearing Aug. 28, 1981, motion for clarification denied (Oct. 7, 1981).
>
> " On June 12, 1981, this Court extended its initial opinion in the present case to explain that our reversal and remand was compelled by the decision of the United States Supreme Court in Beck v. Alabama, [447] U.S. [625], 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and was "consistent with the interpretation of that decision" reached by the Fifth Circuit in Evans v. Britton, [639] F. 2d [221] [March 19, 1981] (1981). We adopt our previous opinion and now unequivocally hold that our pre-

vious opinion in this case was based upon federal constitutional grounds. Moreover, our opinion in Reed v. State, supra, rather than altering our previous decision in this case explained further why we felt compelled by federal constitutional considerations to reverse the conviction in the case." (Ritter v. State [S. Ct. Ala., Dec. 11, 1981] _____ So. 2d _____) (Emphasis supplied).

The question here is not whether or not retrying all these cases is a good idea but whether this Honorable Court's decision in Beck mandates retrial in every case without regard to the evidence. The Alabama statute before the severence of the Preclusion Clause required that juries choose between guilt of the capital offense or absolute acquittal, even when the evidence suggested a middle verdict. However, had the Preclusion Clause never existed, this case would still have presented the Respondent's jury with the same choice. The evidence provided no basis for lesser included offenses.

Thus, the possibility of a verdict of guilty of a lesser included offense was precluded by the evidence and the constitutional prohibition against arbitrary and capricious verdicts. In other words, the Preclusion Clause had no impact whatever on this case.

Nothing in this Honorable Court's Opinion in Beck suggests a mandate for rubber stamp reversals of cases which could not have been affected in any way by the Preclusion Clause. In holding that it did, the Court of Criminal Appeals and Supreme Court of Alabama's decisions and opinions in this case are in conflict with Beck v. Alabama, supra.

A literal interpretation of Beck's "in every case" language is not required as the passage in question itself reveals. In that passage, this Court explained that the presence of lesser offense verdict options "may encourage the jury to convice for an impermissible reason" when

the jury has a "belief that the defendant is guilty of some serious [lesser included] crime and should be punished." Beck v. Alabama, 447 U. S. at 642. The only time the jury could rationally reach a "belief that the defendant is quilty of some serious [lesser included] crime," is when there is some rational basis in the evidence for such a belief. Therefore, the only cases in which preclusion of lesser offense verdict options could encourage capital offense convictions based on impermissible reasons are cases in which there is at least some evidentiary basis for a verdict convicting the defendant of a lesser offense instead of the capital offense.

The phrase "in every case" must also be limited insofar as it refers to the second "extraneous factor" set out in the paragraph

of the Beck opinion in question, which is that: "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason - that, whatever his crime, the defendant does not deserve death." 447 U.S. at 642-643 (footnote omitted). This Court cannot have meant that there was a constitutionally intolerable risk of acquittal in Alabama capital cases tried before the Beck decision, because this Court pointed out that there had been a 96% conviction rate in pre-Beck capital cases. 447 U. S. at 641 & n. 18. Surely, a 4% acquital rate is not intolerably high.

What this Court did mean in the paragraph in question is evident from the particular argument that it was written to answer. Alabama had argued that any effect the pre-

slusion clause might have in influencing a jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a serious lesser offense would be offset by the effect of the seeminly mandatory verdict form requirements. The argument was that when there was an evidentiary basis for a lesser offense, the preclusion clause's push toward improper convictions would be offset by the verdict form's pull toward improper acquittals. Beck v. Alabama, 447 U. S. at 638-641. This Court rejected that argument. id., at 639-643, but the important point here is that the language of the Beck opinion referring to an intolerable risk of erroneous factfinding "in every case" was intended to answer it. Because Alabama had argued that in every

case like Beck in which there was an evidentiary basis for a lesser included offense there would be an offsetting of pressures on the jury, this Court in rejecting that argument answered that in every such case "in every case" like Beck's there would be uncertain and unreliable factfinding. But in cases like the present one where there was no evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no reason for the jury to believe that he was guilty of a serious lesser offense and should not be acquitted for that reason.

In Ritter v. State, supra, three justices of the Alabama Supreme

Court concluded that the Beck decision did not mandate the reversal of a pre-Beck conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existance of the preclusion clause.[4] That is the

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[4] Those three justices of the Alabama Supreme Court were outvoted by a 6 member majority which concluded, "consisten[ly] with the interpretation of that decision reached by the 5th Circuit," that the Beck decision " compelled" the reversal of all pre-Beck capital convictions regardless of the facts. Ritter v. State, supra, slip op. at 2 (majority opinion), pp. 1a-2a, infra, id., at 3 (Torbert, concurring specially), p. 2a infra.

The fact that a majority of the Alabama Supreme Court, influenced by the 2 member majority in the court below, joined that court in misinterpreting the Beck decision simply proves that this Court needs to correct both courts. This court has the opportunity to correct the Alabama Supreme Court's misinterpretation of Beck in Alabama v. Ritter, No. 81-247 (certiorari filed Aug.6, 1981).

correct interpretation of the Beck decision.

We must add at this point what has already been incicated previously. That is, that this Respondent was in no way harmed by the existence of the preclusion clause. With this in mind we must submit that lacking such harm or prejudice the Alabama Court's decision below in Beck, supra, which was based on a fundamental Due Process Clause claim, can not stand.

There was no evidence of harm to the Respondent in this regard nor is there any evidence that the preclusion clause affected his defense. Thus, a finding below that there was a violation of fundamental fairness through due process can not stand. One simply should not be allowed to claim a denial of fundamental fairness. absent some harm or prejudice. This is another reason why the Alabama

Court's reliance on Beck, supra under these circumstances is improper.

IN THE ALTERNATIVE, THIS PETITION SHOULD NOT BE DECIDED UNTIL THIS COURT DECIDES THE EVANS CASE

As previously addressed herein this case presents one very important question concerning the Alabama Courts' interpretation and application of the Beck v. Alabama, 447 U.S. 625 (1980) decision. This same question has been previously raised in numerous other related cases, eg., Hopper v. Evans, No. 80-1714 (certiorari granted June 22, 1981 and presently pending in this Court) and Ritter v. Alabama, (cert. now pending). The question is also presented in separate petitions filed contemporaneously herewith, see: Alabama v. Bryars; Alabama v. Hill. The importance of this issue can not be under-stated.

Because of this importance and its effect on other Alabama cases, it is asked that the Court grant this certiorari petition and continue with a decision on the merits. However, if this petition is not granted then this petition should be held until a decision is reached in the Hopper v. Evans, supra case.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision and opionions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama and on such review will reverse the decisions of said Courts granting a new trial to the Respondent.

CHARLES A. GRADDICK
ATTORNEY GENERAL

EDWARD E. CARNES
ASSIST. ATTORNEY GENERAL

JAMES F. HAMPTON
SPE. ASS'T. ATT. GENERAL

CERTIFICATE OF SERVICE

I, James F. Hampton, a Special Ass't. Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____day of _____, 1982, I did serve the requiste number of copies of the foregoing on the Attorney for the Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Griffin Sikes
P. O. Box 759
Andalusia, Ala. 36420

Honorable John B. Givhan
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JAMES F. HAMPTON
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APPENDIX A

August 4, 1981

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM 1980-81

4 Div. 646

Charles Bracewell,alias

v.

State

APPEALED FROM COVINGTON CIRCUIT COURT

AFTER REMANDMENT BY THE SUPREME COURT OF ALABAMA

HARRIS, PRESIDING JUDGE

The judgement of the conviction is reversed and the cause remanded for a new trail on authority of Beck v. Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), on remand, Ala. 396 So. 2d 645, (1981), and Ritter v. State, Ala. S. C. No.77-798 (Ms. May 8, 1981), Ala.Cr. Appr., 1 Div 837 (Ms June 23, 1981). July 7, 1981, Motion

for Stay of Mandate Dnied by Ala.

S. C.

REVERSED AND REMANDED

All judges concur.

APPENDIX B

OFFICE OF CLERK OF THE
SUPREME COURT OF THE STATE
OF ALABAMA
MONTGOMERY

December 11, 1981

Re: 81-75
Ex Parte: State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

Re: Charles Bracewell, alias

v.

State of Alabama

PETITION FOR WRIT OF CERTIORARI
DENIED. NO OPINION.

PER CURIAM

All justices concur, except Adams,
J., not sitting

Office - Supreme Court, U.S.
FILED
MAY 11 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 81-1514

OCTOBER TERM 1982

STATE OF ALABAMA,

PETITIONER,

VS.

CHARLES BRACEWELL,

RESPONDENT.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED

DOES THE DECISION OF THIS HONORABLE COURT IN BECK V. ALABAMA, 447 U.S. 625 (1980), REQUIRE THE AUTOMATIC RETRIAL OF ALL CASES TRIED UNDER THE ALABAMA CAPITAL PUNISHMENT STATUTE PRIOR THERETO WITHOUT REGARD TO THE EVIDENCE?

PARTIES

In the Circuit Court of Covington County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner Herein, and Charles Bracewell, Respondent herein.

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TABLE OF CONSTITUTIONAL PROVISIONS

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Sections 13-11-2

CONSTITUTIONAL PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> ". . . All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law..."

STATUTORY PROVISIONS INVOLVED

Code of Alabama, 1975, Title 13, Sections 13-11-1 through 13-11-9.

STATEMENT OF THE CASE

Respondent, Charles Bracewell, was convicted under Alabama's Death Penalty Statute of the robbery-intentional killing of Rex Carnley and sentenced to death. The conviction and sentence was affirmed by the Alabama Court of Criminal Appeals in an opinion issued January 30, 1979. The Alabama Supreme Court, on petition, remanded the case to the trial court to determine whether or not a juror in

the case, in spite of her attitude towards capital punishment, could have considered the evidence and instructions of the court and returned a verdict of guilty if warranted. The Alabama Supreme Court further held that the sentencing authority misapplied an aggravating circumstance and should reconsider its finding that the capital felony was committed for pecuniary gain. Application for Rehearing was overruled on September 7, 1979. The case was remanded by the Court of Criminal Appeals on October 16, 1979. Upon the trial Court's actions in this regard, the Court of Criminal Appeals affirmed again in an opinion dated January 22, 1979.

On March 6, 1981, the Alabama Supreme Court reversed and remanded on the authority of Beck v. Alabama, 447 U.S. 625, (1980). Then on April 10, 1981, the Court issued an Order overruling application for rehearing, withdrawing its opinion of March 6, 1981, and reversing and remanding the case to the Court of Criminal Appeals for further consideration in light of Beck, supra. On August 4, 1981, the Court of Criminal Appeals reversed and remanded the cause to the trial Court on authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), on remand, Ala. 396 So.2d 645 (1981), and Ritter v. State, Ala. S.C. No.

77-798 (Ms. May 8, 1981), Ala. Cr. App., No. 1 Div. 837 (Ms. June 23, 1981). Application for rehearing was overruled on October 6, 1981.

On October 20, 1981, the State filed a Petition for Writ of Certiorari in the Alabama Supreme Court. That writ was denied on December 11, 1981, without opinion.

STATEMENT OF THE FACTS

The facts indicate that Rex Carnley, deceased, died on August 15, 1977. On the evening of August 14, 1977, Mrs. Carnley locked him inside his rural store in Covington County, Alabama. She padlocked the front door of the store by locking a padlock on the outside as she left the store. The body of Carnley was discovered the next morning, August 15, 1977, inside the store, and the front door was open. There were no witnesses to the alleged shooting of Carnley.

Charles Bracewell was arrested in November, 1977, on an unrelated charge, and any confession he might have made implicating he and his wife, Debra Bracewell, in this matter, was made either while Charles was in jail or in the custody of some sheriff of the State of Alabama. Moreover, any

alleged confession of Charles Bracewell was induced by law enforcement officers offering to let him see his wife, Debra Bracewell, who was also in jail and who had been implicated in the same alleged crime.

The Death Penalty Statute Charles Bracewell was tried under included the "Preclusion of Lesser Included Offenses" clause.

ARGUMENT

I. THIS COURT'S DECISION IN BECK V. ALABAMA CONTROLS THIS CASE.

As stated in the Statement of the Case, the Alabama Court of Criminal Appeals, after remandment by the Supreme Court of Alabama, and after careful review and consideration, reversed and remanded this case for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L.Ed. 2d 392 (1980) and Ritter v. State, Ala. 403 So.2d 154 (1981).

This case was tried and prepared for trial by counsel for Respondent laboring under the Alabama Death Penalty Statute which included the "Preclusion of Lesser Included Offenses" clause. This mere fact alone affected Respondent's

counsels' approach to preparation for and trial of the case. Stated differently, Charles Bracewell was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions. This fact known to Respondent and his counsel before trial controlled preparation for trial and trial strategy at trial. Petitioner argues that in Ritter v. State, three Justices of the Alabama Supreme Court, a majority, concluded that the Beck decision did not mandate the reversal of a pre-Beck conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existence of the Preclusion clause. Of course, these three Justices were outvoted by a six member majority which concluded that the Beck decision compelled the reversal of all pre-Beck capital convictions regardless of the facts. For the reasons just stated, the majority of the Alabama Supreme Court was absolutely correct in that but for the Preclucion Rule, facts might or would have been stated differently, trial strategy might or would have been different, and

even evidence of lesser included offenses might or would have been presented by the Respondent. That is the thrust of the argument that mandates a trial for Charles Bracewell in this case, particularly in view of the fact that there were no witnesses whatsoever to the alleged shooting of Carnley;and Charles Bracewell, an uneducated man, allegedly made confessions jointly implicating he and his wife, Debra Bracewell, while either in the "black-hole" of the Covington County, Alabama, jail, or while being transported from the Coffee County, Alabama, jail to the Covington County, Alabama, jail, shackled and in the custody of Alabama sheriff's deputies.

Petitioner states: "However, had the Preclusion Clause never existed, this case would still have presented the Respondent's jury with the same choice." In the following sentence Petitioner then states: "The evidence provided no basis for lesser included offenses." These two sentences taken separately make precisely the point for reversal. First, it is absolutely untrue that had the Preclusion Clause never existed this case would still have presented the Respondent's jury with the same choice. That statement just does not make sense in that

but for the Preclusion Clause Respondent's defense would not have been unduly restricted with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions. Consequently, assuming for argument's sake but not conceding that the evidence provided no basis for lesser included offenses, the reason for this is that the Preclusion Clause prohibited Respondent's entitlement to a jury instruction on lesser included offenses.

This case, Charles Bracewell's case, is one at which his life is at stake. This Court, in Beck v. Alabama, 100 S.Ct. 2382, 2389 (1980), stated it very succinctly when the Court said:

> "Death is a different kind of punishment from any other which may be imposed in this country . . . .From the point of view of the defendant, it is different in both its severity and its finality. . . To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

Precisely, at the trial of Charles Bracewell in

Covington County, Alabama, it was the unavailability of a lesser included offense instruction that renders Alabama's Preclusion Clause unconstitutional and entitles Charles Bracewell to a new trial.

CONCLUSION

For the reasons stated, the Respondent prays that the Petition of the State of Alabama be denied.

John B. Givhan

Griffin Sikes

CERTIFICATE OF SERVICE

I, John B. Givhan, a member of the Bar of the Supreme Court of the United States and one of the attorneys for Respondent, Charles Bracewell, do hereby certify that on this 6 day of May, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

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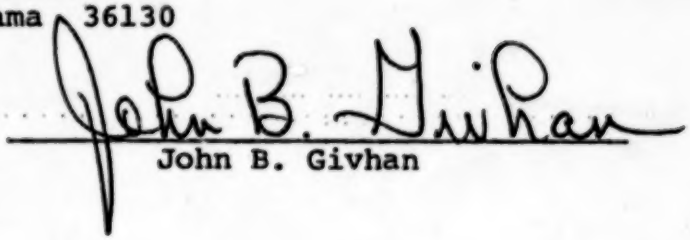

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